and privileges cannot be modified to the disadvantages of all the founder members.

Section 31 of the Companies Act provides the manner and circumstances under which articles of association can be amended, but it cannot withdraw the rights and privileges given by the company to anyone who is a shareholder or an outsider.

Clause 5 of the Memorandum of Association deals with shares. It reads as follows:

"The share capital of the company is MR 3,000,000 (Three Million Malaysian Ringgit) divided into 30,000 shares (Thirty thousand) ordinary shares of MR 100 (One Hundred Malaysia Ringgit) each with power to increase or reduce the capital to consolidate or subdivide the share into shares of larger or smaller amounts and to issue all or any part of the original or any additional capital with any special or preferential rights or privileges or subject to any special condition and either with or without any special designation and also from time to time alter, modify, commute, abrogate or deal with any such rights, privileges, terms, conditions and designation as provided by the Articles of Association of the company."

The power to alter, modify, *etc.*, given in the above clause refers only to the shares which would be issued after the formation or amalgamation of the company and not in respect of the rights and privileges already enshrined in the Articles of Association. The amendment made on August 21, 1967, to Article 11 is valid because it was done with the consent of all the founder members, but not in the case of the amendment made on May 9, 1981, as shown in exhibit "AB-13" because it was objected to by plaintiff No. 1. The law of majority does not apply in this matter for reasons stated earlier.

Similar argument applies in respect of the amendments to Article 71. I therefore hold that the amendments to Articles 11 and 71 are null and void.

My findings and order as already recorded in the notes of proceedings are as follows:

Findings

(1) The notices terminating the services of the two plaintiffs as employees of the 1st defendant company are null and void.

(2) The two plaintiffs were not given notices to terminate their services as the Directors of the company.

(3) The two plaintiffs were legally disqualified as Directors under Article 75 for not attending four consecutive meetings of Board of Directors.

(4) The amendments to Articles 11 and 71 are null and void as they infringed the rights and privileges given to some individuals on the formation of the company.

ORDER

(1) Defendants to pay the salaries of the two plaintiffs from the time they were purported to be terminated to date of judgment with 8% p.a. interest from date of judgment to date of payment.

(2) Plaintiffs are continued to be employed by defendant No. 1 on the same terms until properly and legally terminated but they shall not be reinstated as Directors of the company.

(3) Plaintiffs are entitled to all the rights and privileges under the original provision of Article 11 of the Articles of Association of the 1st defendant company. The amendments to Articles 11 and 71 made on May 9, 1981, are null and void.

(4) Defendant to pay costs to be taxed.

Order accordingly.

Solicitors : *Joseph Lee & Co.; Chu Thien Co.*

MUSTAPHA BIN MOHAMED NOH v. OSMAN BIN SHAHIDAN & ANOR.

[O.C.J. (Mohamed Dzaiddin J.) January 10 & 28, 1985]

[Penang – Civil Suit No. 76 of 1981]

Contract – Contract for sale of land – Land in the name of the deceased of whom vendors were the only heirs – Agreement providing for return of advance paid in the event of vendors failing to complete the purchase – Vendors cannot repudiate contract by returning the advance – Specific performance.

In this case the land was registered in the name of Che Rosiah bte Awang, deceased. The daughter and son, who were the only heirs of the deceased, agreed to sell the land to the plaintiff for $8,000. An agreement was drawn up and the plaintiff paid $2,000 advance towards the purchase consideration. Clause 8 of the argument provided for the return of the advance if the vendors failed to complete the

purchase in accordance with the stipulations therein contained. Defendants decided not to complete the sale and returned the advance of $2,000 to the plaintiff. The plaintiff sued the defendants for specific performance. The Registrar granted defendants unconditional leave to defend the suit. Against this order the plaintiff appealed.

Held: (1) a deed has to be construed as a whole;

(2) clause 8 of the agreement does not mean that the defendants could for no apparent reason and unilaterally revoke the agreement and refund the deposit;

(3) the obvious intention of the parties was that in the event the said property could not be transferred to vendors (defendants) they shall refund to the plaintiff the deposit paid;

(4) the plaintiff is entitled to the specific performance of the said agreement.

Cases referred to:

(1) *Kau Nia Enterprise (Pte.) Ltd.* v. *Teck Wah Corporation (Pte.) Ltd.* [1982] 1 M.L.J. 10.
(2) *Esso Standard Malaya Bhd.* v. *Southern Cross Airways (M) Bhd.* [1972] 1 M.L.J. 168.
(3) *North Eastern Rly.* v. *Hastings* [1900] A.C. 260, 267.
(4) *Lloyd* v. *Lloyd* (1837) 2 My. & Cr. 192; 40 E.R. 613.

CIVIL SUIT.

Darshan Singh for the plaintiff/appellant.
Ariffin Hj. Daud for the defendant/respondents.

Cur. Adv. Vult.

Mohamed Dzaiddin J. : This is an appeal against the decision of the Registrar made on January 20, 1982 who granted the defendants unconditional leave to defend the suit.

The plaintiff's claim is for specific performance of an agreement to purchase a piece of land known as Holding 170 Mukim 14 Seberang Perai made on May 19, 1977. The defendants as vendors agreed to sell to the plaintiff the said land for $8,000.00. Upon execution, the plaintiff had paid a total sum of $2,000.00 towards the purchase price. It was a term of the said agreement that the purchase was to be completed and the balance of the purchase price to be paid within three months from the date when the said land was vested in the defendants. However, at the time when this agreement was executed, the said land was still registered in the name of Rosiah bte. Awang, deceased and that the defendants as beneficiaries were to take all reasonable steps to have the said land vested in them. Then, sometime after the execution of the said agreement, the defendants decided not to complete the sale and they orally notified the plaintiff of their decision and refunded the sum of $2,000.00. This was rejected by the plaintiff. It was the defendants' contention that they were entitled to do so by virtue of clause 8 of the said agreement.

Clause 8 reads as follows:

"If the Vendors fail to complete the purchase in accordance with the stipulations herein contained the Vendors shall refund to the Purchaser the sum of Dollars Eight Hundred paid under clause 1 above and the sum of Dollars One thousand and two hundred ($1,200/-) paid under clause 2 above and no interest shall be payable on the said sum."

Here, I agree with the learned Registrar that the issue to be decided is the proper or true construction to be given to clause 8. There is, thus, a triable issue with a fair or a reasonable probability the defendants having a *bona fide* defence. However, after having given the unconditional leave to defend, the learned Registrar should have proceeded to decide the matter. He ought not to have left it by merely granting unconditional leave to defend. As this is essentially a question of the construction of an agreement in which a trial including an oral evidence (if any) will not take the matter further, the learned Registrar is in as good a position as a trial judge to decide the true construction of the said agreement. (See: *Kau Nia Enterprise (Pte.) Ltd.* v. *Teck Wah Corporation (Pte.) Ltd.*,[1] *Esso Standard Malaya Bhd.* v. *Southern Cross Airways (Malaysia) Bhd.*[2]).

Now, coming to the real issue, counsel for the defendants repeated his written submission by stating that clause 8 allowed the defendants as vendors not to proceed with the sale subject to the refund of money paid under clause 1 and clause 2 of the said agreement. It was the contention of the plaintiff that the intention of clause 8 was to enable the defendants as vendors to refund the part-payment of the purchase price upon termination of the agreement in the event that the said land could not be registered in the vendors' names after the Court Order.

It is a well-known settled principle of construction that a deed is to be construed as a whole. In *North Eastern Rly.* v. *Hastings (Lord)*[3] Lord Davey said as follows:

"The deed must be read as a whole in order to ascertain the true meaning of its several clauses and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed if that inter-

pretation does no violence to the meaning of which they are naturally susceptible."

Looking at this agreement, it is clear that the defendants agreed to sell the land to the plaintiff at $8,000.00 subject to the terms and conditions mentioned therein. It is also clear in the preamble to the said agreement at the time when the agreement was made the said land was still registered in the name of Rosiah bte. Awang, deceased, who was survived by the defendants. It was stipulated that the defendants had presented a claim under section 53 of the National Land Code (Penang and Malacca Titles) for them to be vested with the said land. The time for the completion of the sale and the obligations of the parties were also provided in the said agreement. However, it is provided in clause 8 that if the vendors fail to complete the purchase in accordance with the stipulations contained in the said agreement, then the vendors had the right to refund the amount already paid under clause 1 and clause 2 of the said agreement. Taking clause 8 by itself, and interpreting it in the manner suggested by counsel for the defendants, it would mean that the defendants could for no apparent reason and unilaterally revoke the agreement and refund the deposit. In my opinion, this would be an absurd situation because it is clearly stated in clause 8 that failure to complete the purchase must be in accordance with the stipulations contained. In fact the key words in clause 8 are "in accordance with the stipulations contained". Obviously, clause 8 must be subject to the stipulations referred to in the preamble, *i.e.*, relating to the ownership or title to the said property. It does appear to me that the intention of the parties was that in the event the said property was not transferred to the defendants, then they shall refund the deposit paid under clause 1 and clause 2 to the plaintiff and the agreement comes to an end. It is the cardinal rule of construction that clear and unambiguous words prevail over intention, but if the words used are not clear and unambiguous, the intention of the parties shall prevail. I quote here a passage from the judgment of Lord Cottenham in *Lloyd* v. *Lloyd*[4] at page 202:

"If the provisions are clearly expressed and there is nothing to enable the court to put upon them a construction different from what the words import, no doubt the words must prevail: but if the provisions and expressions be contradictory and if there be grounds appearing from the face of the instrument, affording proof of the real intention of the parties, then that intention will prevail against the obvious and ordinary meaning of the words. If the parties have themselves furnished a key to the meaning of the words used, it is not material by what expression they convey their intention."

Clearly, in my opinion, the words in clause 8, taken in the literal meaning have failed to carry out the obvious intention of the parties, *i.e.*, that in the event the said property could not be transferred to the defendants, they shall refund to the plaintiff the deposit paid under clauses 1 and 2 of the said agreement. In my judgment, the defendants were wrong in terminating the agreement by refunding to the plaintiff the deposit paid under clause 1 and 2 of the said agreement. The plaintiff is entitled to specific performance of the said agreement. I, therefore, enter judgment for the plaintiff under Order 81 Rule 3 of the Rules of the High Court, 1980 and costs.

Order accordingly.

Solicitors : *Darshan Singh & Co.; Ariffin & Co.*

PERBADANAN KEMAJUAN EKONOMI NEGERI JOHOR v. LIM SHEE PIN & ANOR.

[O.C.J. (Shankar J.) February 17, 1985]

[Johore Bahru – Civil Suit No. 441 of 1975]

Contract – Contract to extract timber from 2060 acres – Actual workable acreage only 776 acres – Premium at $72,100 plus tender price of $77,000 – Premium proportionately reduced – Equity and good conscience demand pro rata reduction of tender price.

In this case, the plaintiffs (Johore SEDC) had accepted a tender of the defendants to extract timber from 2060 acres virgin land for a premium of $72,100 ($35 per acre) and tender price of $77,000. The defendants found out that the area was not virgin land and made a representation to the Forest Department which had given permission to SEDC to extract timber. The Forest Department reduced the workable area from 2060 acres to 776 acres. The plaintiff insisted that the defendants were liable to pay the full amount of the tender price irrespective of the fact that the defendants had ample opportunity to inspect the area and they were bound to pay the full tender price. On failure of the defendants to pay the full amount, the plaintiffs filed a suit against the defendants. The plaintiffs were also not able to produce the original tender document in court as according to them it had been destroyed in a fire.

Held: plaintiffs should have in equity and good conscience followed the line taken by the Forest Department and reduced the amount payable to them *pro rata*. The amount of the tender price should therefore be reduced *pro rata*.